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**In the
Supreme Court of the United States**

—○—
**October Term, 1953
No. 476**
—○—

BRANIFF AIRWAYS, INCORPORATED,

Appellant,

VS.

**NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL.,**

Appellees.

—○—
**APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEBRASKA**
—○—

BRIEF OF APPELLANT
—○—

✓
✓ **WILLIAM J. HOTZ,
WILLIAM J. HOTZ, JR.,**
Of Omaha, Nebraska,
Counsel for Appellant.

✓ **ROGER J. WHITEFORD,**
**Of WHITEFORD, HART,
CARMODY & WILSON,**
Washington, D. C.,
and

○ **ROBERT M. KANE,**
Of Hotz & Hotz,
Omaha, Nebraska,
Of Counsel.

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**APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEBRASKA**

BRIEF OF APPELLANT

Opinion Below

The Supreme Court of the State of Nebraska filed its final opinion on July 17, 1953. An exact copy is included in an appendix to this brief (App. A). It is printed in the record as R. 25-35, and is officially reported in 157 Neb. 425, 59 N. W. 2d 746. Jurisdiction was noted herein on January 4, 1954 (R. 56).

Jurisdictional Statement

1. The jurisdiction of this Court is based upon Title 28, United States Code, Section 1257(2). In the court below there was "drawn in question the validity of a" taxing statute of the State of Nebraska on the grounds of repugnancy to the Constitution of the United States, and the decision below was "in favor of its validity."

2. Specifically and directly, Article I, Section 8, Clause 3, of the Constitution of the United States was drawn in question below and now on appeal. Indirectly and for comparative application to the facts, there were drawn in question below, and now on appeal, Article I, Section 9, Clauses 5 and 6, and Article I, Section 10, Clauses 2 and 3, of the Constitution of the United States (R. 1, Par. 2; R. 5, Par. 1; R. 6, Par. 2; R. 25, Judgment; R. 26, Par. 2; R. 34-5).

3. The Nebraska taxing statute in question directs the defendants-appellees to assess an ad valorem tax on appellant's aircraft which alighted in Nebraska during regularly scheduled interstate commercial flights. The statute is copied in full in the appendix to this brief (App. B) and in the record as R. 20. It is Sections 77-1244 to 77-1250, R. R. S. Nebraska 1943, as amended. The first tax assessed thereunder was for 1950, and similar assessments have been made annually and are continuing to be made annually. All assessments are unpaid (R. 18, Par. 22; R. 19, Par. 23; Stip. R. 47).

4. These ad valorem taxes on appellant's aircraft while engaged in interstate flight are contested by this action on the federal constitutional grounds presented.

Questions Presented

1. The question presented is whether or not the aforementioned final opinion of the Supreme Court of Nebraska (App. A) should be reversed because the above-cited ad valorem taxing statute (App. B) is repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States.

2. It appears from a Stipulation of Facts attached hereto (App. C and R. 10) and from the findings in the opinion of the court below (App. A) that the appellees, which are the taxing body and its officials, have assessed and will enforce by levy an ad valorem tax upon the aircraft of the appellant, as defined in the statute unless the State act (App. B and R. 20) is declared invalid by this Court.

3. Appellees' basis for the tax is solely the statute in question. The facts are that the aircraft descend from the airways above Nebraska to an airport in Nebraska and leave by the airways above Nebraska in pursuit of interstate commerce missions. Appellees assert that such activity justifies, under the statute, the assessment made and being made. There were and are fourteen such stops at the Omaha (Nebraska) Airport, each is from five to twenty minutes duration. On these facts only appellees have assessed the statutory defined proportional valuation of each such aircraft for ad valorem taxation.

4. In considering the question presented, it affirmatively appears that the State of Nebraska is neither the home port nor the State of creation of the appellant, Braniff Airways, Incorporated, or its predecessor, Mid-

Continent Airlines, Inc. Each aircraft, as it alights and takes off, does so at the previously designated (Omaha) airport within Nebraska. The appellant pays the City of Omaha a standard contractual charge for these airport landings which amounted to \$22,000 in 1950 (App. C). This charge is based upon the number of landings and take-offs made by appellant's aircraft at the airports in Nebraska. Appellant also pays an ad valorem tax upon all its personal property located in the State. A gasoline tax of \$14,180 was assessed and paid for 1951, which tax is used for betterment of airport facilities in the State. All these facts were stipulated below and on this appeal (App. C; R. 27 and R. 17, Par. 19). The only tax contested is the ad valorem tax on the aircraft coming into and leaving Nebraska in interstate commerce (App. B and R. 20; App. A and R. 26).

5. In deciding the constitutional question, the Court may accept as a conclusion of law from the opinion below (App. A) and the Stipulation of Facts (App. C) that each aircraft was assessed while engaged in interstate commerce; that these aircraft are the sole incident of the tax in question; that the tax is based upon the Nebraska proportion of a system valuation under formulae set forth in the act (App. B and R. 20).

6. Appellant presents the fact under the stipulation that said aircraft have attained at no time a taxable situs within the State. In consequence thereof, no proportional valuation of the aircraft may legally be assessed. The tax was assessed for no use, no privilege, and no legal right granted, nor protection, nor reciprocal benefit inherent in the tax (App. C, par. 25, 26, 27).

7. Consequently, the question presented: *Generally*—(A) Is the tax assessed invalid and repugnant to the Commerce Clause of the Federal Constitution as burdening the interstate flight of appellant's aircraft while on interstate commerce missions at the (Omaha) Nebraska airport, for which right to use the airport it pays?

7. (B) The question presented is extended to the consideration of whether or not, from the effective date of the United States Civil Aeronautics Code, June 23, 1938 (52 Stat. 977, et seq., Title 49, U. S. C., Ch. 9, Secs. 401-705), the Congress of the United States has pre-empted for the Government the entire field of aviation, and particularly the aircraft in question in flight operations among the States.

8. *Specifically*—(1) Has Congress removed aircraft, which are pursuing interstate flight under the rules and regulations of the congressional act, from the power of a state to tax the aircraft so engaged for general revenue-producing state purposes, unrelated to use, supervision, welfare, police power, or reciprocal benefits?

8. (2) Does the word "regulation" contained in the Commerce Clause of the Federal Constitution preclude a state from assessing and enforcing an ad valorem tax on aircraft alighting from the air above Nebraska and ascending into it for essential engagement in commerce among the states?

8. (3) Does the alighting and ascending of the aircraft on fourteen daily regularly scheduled interstate flights to and from the state change the answer to either of questions 8 (1) and 8 (2), when it appears that the stops

at the airport were five to twenty minutes each, sometimes to refuel, and always to load and unload persons and property coming and going in interstate commerce and for no other purpose? (App C.)

8. (4) Does Section 403 of the congressional act (52 Stat. 980, 49 U. S. C., Ch. 9) dated June 23, 1938, reading,

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States,”

apply to the aircraft and the appellant owner in the case at bar? If so, does such declaration pre-empt the aviation field for taxation by Congress alone to the extent of nullifying the State ad valorem tax statute in question?

8. (5) Did not the State of Nebraska enact the tax statute in question in 1949 (App. B), effective 1950, on the erroneous assumption that the air above Nebraska was within its taxing jurisdiction?

8. (6) Did not the highest court of Nebraska err in its application of the law announced in its opinion (App. A), when it adopted law applicable to those instrumentalities of commerce that had (a) attained a taxable situs in the state when traversing the lands, streams, or highways therein, or (b) derived benefits from the State for taxable uses for facilities, privileges, and protection made available by the State?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States:

Constitution:

Article I, Section 8, Clause 3—Congress alone may regulate commerce among states, and to regulate includes to tax.

Article I, Section 9, Clause 5—Prohibits tax on exports from any state; Clause 6—“No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.”

Article I, Section 10, Clause 2—“No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”

Clause 3—“No state shall, without the consent of Congress, lay any duty of tonnage, * * *”

Title 28, U. S. C., Sec. 1257(2)—Jurisdiction by appeal.

Civil Aeronautics Code

52 Stat. 977, et seq.; Title 49 U. S. C., Ch. 9, Sec. 401-705. Adopted June 23, 1938.

Epitomization of Aeronautics Code

Subchapter I—Sec. 401, Definitions; Sec. 402, Declaration of Policy of the United States to regulate and control civil aeronautics over the navigable air space of the United States; Sec. 403, Public right of transit in the navigable air space of the

United States made certain to any citizen of the United States as a part of the public domain.

Subchapter II—Organization of Civil Aeronautics Board, Secs. 421-427.

Subchapter III—Powers and duties of Administrator of Civil Aeronautics to foster air commerce; Sec. 452, creation of civil airways and facilities, establishment of airways, duties of Administrator in reference thereto; Sec. 453, the expenditure of Federal funds therefor; Sec. 454, establishment by the Government of meteorological service to provide for the safe and efficient movement of aircraft in air commerce; Sec. 455, supervision and development to improve air navigation facilities for aircraft, its engines, propellers, and appliances; Sec. 456, collection and dissemination of information in reference thereto; Secs. 457-60, development, planning, and detailing of certain Government employees for additional training, and operating of training schools for the employees under the C. A. Act to supervise and regulate commercial aviation, with powers to investigate and proceed to enforce the delegation of powers in reference to commercial aviation set forth by Congress in the act.

Subchapter IV—Air Carrier Economic Regulation—Secs. 481-2, the right to adjudge issuance of certificates of public convenience and necessity essential to carry on air commerce in aircraft; Secs. 483-4, tariffs and rates to be filed and supervised by the Government; Secs. 485-6, transportation of mail regulated and supervised by the CAB; Sec. 488, consolidation and mergers regulated and supervised by CAB in reference to all commercial aviation; Sec. 490, conditions for loans and financial aid and regulation of same by CAB; Sec. 495, inquiry into air carrier management; Sec. 496, classification of air carriers.

Subchapter V—Nationality and Ownership of Aircraft—Secs. 521-4, registration of engines, propellers, and appliances, and the licensing and inspection of the same, including safety regulation under Federal regulation and licensing.

Subchapters VI and VII, Secs. 551-82, extensive and far-reaching air safety regulations, including the investigation of accidents, with power to act in reference thereto.

Subchapter VIII—Secs. 601-3, other administrative agencies of the Federal Government for aid and supervision of aviation, such as the weather bureau and Presidential powers regarding overseas commercial flights.

Subchapter IX—Secs. 621-2, Penalties, both civil and criminal, in reference to violations of the C. A. Code; Sec. 623, definition of venue and prosecution of offenses.

Subchapter X—Sec. 641-45, procedure for conduct of proceedings before Board; Sec. 646, judicial review of the action of the CAB under the Code; Sec. 647, judicial enforcement of the action of the Board.

Subchapter XI—Miscellaneous powers of the Government; Sec. 671, power to remove any hazards to air commerce anywhere after hearing and determination by the CAB.

Subchapter XII—Secs. 701-4, Agency which will encourage and permit the maximum use of civil aircraft consistent with national security.

Chapter XIV (60 Stat. 170-80, Title 49 U. S. C., Secs. 1101-1119)—providing for federal aid to airports, and also the financing for commercial use of national airports throughout the nation and in foreign countries.

The extent of governmental aid to aviation is reviewed in U. S. Code Congressional and Administrative

Service, Vol. 2, 1950, p. 3945; "Federal Airport Act," House Report No. 2709, and in Vol. 1, 1950, p. 1063; and in Vol. 2, 1950, p. 3998, Text of Act, Vol. 1, 1950, p. 1084, "To Promote the Development of Commercial Aircraft and to Declare the Policy of Congress to promote and finance experiments in aid of safety and betterment of aircraft."

(The foregoing outline of the C. A. Code illustrates appellant's position that the Federal Government has undertaken supervision of all commercial flight activities to the exclusion of the states. The legal result, with supporting cases, is set forth in the following Specification of Errors and Law Points and discussed in the Arguments.)

Nebraska Statutes:

Ch. 77, R. R. S. Nebraska 1943, Sec. 1244-1250; statute involved on this appeal. Copied in full, App. B hereof and R. 20.

STATEMENT OF THE CASE

1. There is appended to this brief and set forth in the record the opinion below (App. A and R. 25) and the Nebraska taxing statute (App. B and R. 20) claimed by appellant to be repugnant to the Commerce Clause of the Federal Constitution. The court below upheld the statute. There was a Stipulation of Facts (App. C; R. 10) upon which the court below rendered its opinion and which is presented to this Court as the facts for this appeal.

2. In stating the case below the Nebraska Supreme Court in its opinion set forth the following facts, which

are the same as the Stipulation of Facts (App. C) and accordingly are submitted to this Court as an acceptable recitation of facts.

"This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such Sections of the statutes authorize the assessment, levy, and collection of an ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

"Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated, was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the

provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used, which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

"The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: 'Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of non-scheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.' It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States."

3. Next follows in the opinion an analysis of the cases cited by plaintiff and defendants below and comments by the court below. The law expressed in the opin-

ion will be the basis of the *Specification of Errors* and the *Legal Points* in this brief following this *Statement of the Case*.

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EPITOMIZATION OF THE STIPULATION OF FACTS

1. It will be noted from the Stipulation of Facts (App. C and R. 10) that the schedule of flights of the various aircraft in question are detailed fully. Two flights southbound through Omaha daily stop, one for five minutes and one for twenty minutes, at the airport in Lincoln. Two northbound flights through Nebraska stop at Lincoln and then in Omaha, and these are on the ground at the airport in Lincoln twenty minutes each. The termini of all these flights and all others are from points outside Nebraska. The stops in Lincoln are the result of a trial period granted by the Civil Aeronautics Authority on July 15, 1951. The flights between Omaha and Lincoln and between Lincoln and Omaha do occasionally take on persons and property between those two close points within the State. The statistics in the Stipulation of Facts show that such traffic was negligible during the test period from July 15, 1951, to January 1, 1952. Statistics thereon in the stipulation show that the percentage of passenger revenue originating and terminating in Nebraska (that is, between Lincoln and Omaha and between Omaha and Lincoln) to the total system income amounted to .051% (App. C, par. 5, 6, 7, 8). The mail tons were .571%, express .390%, freight .250% and the number of passengers .271% of the total.

[Appellant submits that the rule of de minimus might well be considered here. However, no question is raised concerning the State's right to tax local property or impose other legitimate tax on localized intrastate business, if it can be separated readily from the interstate business.]

By direct quotations from the facts it is proven that:

"2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destination in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the over-all base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the over-all base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specific cities."

3. The Stipulation of Facts show that Mid-Continent Airlines, Inc., and Braniff Airways, Incorporated, the appellant, were consolidated effective August 1, 1952, with a stipulation in the record that the appellant in this case shall be Braniff Airways, Incorporated (R. 46-7).

4. The consolidated air miles, unduplicated, were stipulated for the entire system to be 7,336 air miles, serving sixty communities in the United States, plus Latin American and Mexican routes. Fourteen of these flights alight in Omaha, Nebraska, and of them four also alight in Lincoln and all are engaged in interstate flights.

5. The Stipulation shows that the distance from Lincoln, Nebraska, to Rulo, Nebraska, the State border, is ninety miles; that it takes forty-two minutes to fly that distance; that there are four such flights each day, being those coming from outside the State to and from Lincoln, Nebraska.

6. The State of incorporation of Mid-Continent was Delaware, and of Braniff is Oklahoma. The executive offices of Braniff are at Dallas, Texas. The home port, so to speak, of the appellant where it maintains repair shops, machinery, equipment, and hangars is the Wold-Chamberlain Air Field at St. Paul, Minnesota. The Stipulation states that after fifty hours of flight each aircraft of appellant must return to Minneapolis and St. Paul under the Civil Aeronautics Code regulations, where it must be governmentally inspected, overhauled, and relicensed (App. C, par. 10).

7. Paragraph 11 (App. C) states that the fourteen aircraft designated are flown through the air within the limits of specifically described and assigned aerial highways under the jurisdiction of the Civil Aeronautics Board; that all parts of the airplane and the personnel, including all pilots, are under government license; that all aircraft and equipment must appear at designated times at the St. Paul base for inspection and relicensing by the United States Government. Consequently, the aircraft and its equipment are there for purposes other than interstate flight.

8. In paragraph 12 (App. C) it is agreed that at the Omaha Municipal Airport the Federal Government has constructed a control tower where the Government

employs a chief airport control officer with eleven assistants, at a governmental expense of \$50,000 a year. These men are so stationed for the purpose of controlling and directing aircraft coming into and departing from the Omaha airport, and are in communication with all the aircraft pilots in question at all times coming to or going from Nebraska. Each aircraft pilot receives instructions when ten minutes out (not miles), of where, when, and how to alight and at which airport and which runway at the airport to use.

9. The government controllers are in constant communication with other major airport control towers spaced throughout the United States directing flight in the air lanes through which appellant's planes are licensed and restricted in flying throughout the nation, including those used by appellant over Nebraska. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priorities in the use thereof. Radio facilities are provided by the Government along these air lanes to direct all air traffic from one point to another. If planes are not equipped with radio phones to talk back and forth with the control tower, the Government safeguards all flights with a radio beam attuned to the aircraft. These and other facilities are owned and financed by the United States to protect and aid all persons engaged in flight.

10. All violations of the rules and regulations of flight, operation, management, and supervision by men or women on the aircraft and the air carrier officials are subject to fines and penalties, civil and criminal, under the Civil Aeronautics Act (App. C, par. 13).

11. At the close of 1951 Mid-Continent, the predecessor of appellant before 1952, had a total operating revenue from all sources of \$9,818,363 with an operating expense of \$9,508,859 and a profit after taxes of \$135,941. The gross income was \$7,681,760.80 from passengers; \$1,608,590.65 from mail; \$331,261.23 from freight, express, and excess baggage; \$171,037.96 from other sources, and \$25,712.68 from miscellaneous items. These amounts total \$9,818,363.32.

12. Mid-Continent was capitalized at 418,755 shares at the par value of one dollar. It had debentures due May 1, 1954, of \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; and May 1, 1963, \$1,000,000 (App. C, pars. 15, 16, 17).

13. In order to prove that the appellant is "paying its way" in the State of Nebraska, the facts were stipulated that the landing fees and depot rental space at the municipal airport in Omaha was approximately \$22,000 for 1951. This was and is by contract with the City of Omaha, and charges for airport use are based on the number of landings and the certified weight of the aircraft here in question as the incident of the tax. The charges are applicable to all air carriers using the Omaha Municipal Airport. The income from the charges are deposited with the Treasurer of the City of Omaha and expended for the Omaha Municipal Airport improvement and maintenance.

14. In 1951, 567,000 gallons of gasoline were taken on by the appellant for refueling purposes at the Omaha Municipal Airport upon which a gallonage tax of \$14,180 was paid. The disposition of this gasoline tax was not

the subject matter of the Stipulation. However, a Nebraska State statute requires that the tax so obtained from gasoline bought for and used in aircraft be deposited in a separate fund by the Treasurer of the State of Nebraska and used under the supervision of the State Commission to aid in building and supervising the construction and the maintenance of airports throughout the State of Nebraska, including the airports in Omaha and in Lincoln (App. C, pars. 18, 19) (R. R. S. Nebraska 1943, Sec. 3-148).

15. The personal property of the appellant, such as office furniture, equipment, auto trucks, and all similar property located at Omaha or Lincoln is taxed in the respective counties. The Douglas County (Omaha) property tax was stipulated to be between \$200 and \$300 annually.

16. The Stipulation further stated that comparable amounts were paid in other municipalities in other states where the aircraft land and take off (App. C, par. 20).

17. Tax forms were filed by Mid-Continent Airlines for 1950 on blanks furnished by the defendant-appellee Tax Commissioner, and for 1950 the mill levy was the same as the mill levy for general revenue throughout Nebraska. Under the formula in the act (App. B) the State Tax Commissioner assessed appellant taxes in the amount of \$4,280.44 for 1950. The valuation figure for the flight equipment for Nebraska for that year under the proportional theory was fixed at \$118,901. That tax was and is unpaid. Similar assessments have been made in increasing amounts each year since and are continuing to be assessed. For 1951 the mill levy was 38, and the tax

was assessed at \$4,518.29. These taxes were on the proportionate value of appellant's aircraft that were flown to and from the airports in accordance with the statutory formulae and rights given the Tax Commission.

18. The manner of arriving at the tax under the statute is set forth in paragraph 22 of the Stipulation (App. C). The tax blank form is divided into three parts. In the first part is a system value formula set up which takes in a five-year average of operating income capitalized at 6%; next a five-year average of the market value of the stocks and bonds is required on the return form; next a book value depreciated cost basis is set up by the Commissioner from the returns required. These are added, and then divided by three, which gives a total to system value of \$3,373,283. Under another part of the formula the statute provides the defendants-appellees shall set up on the return, flight equipment apportionment to the total assets, obtained by the ratio of all flight equipment cost to the total operating property cost. This resulted in flight equipment cost to the total cost of the property at 61.1% without depreciation. With depreciation it was 33.5% of the total. So that the average of the undepreciated and the depreciated aircraft to all property cost was 47.3%. This was obtained by adding 61.1% to 33.5% and dividing by two.

19. Under the third section of the formula set forth in the statute, the total of arrivals and departures in Nebraska for the previous year was 10,306. The total arrivals and departures over the system for the previous year were 114,104. The consequent percentage of 9.032 for Nebraska resulted. The ratio of revenue tons handled in Nebraska to the total revenue tons handled over the

system gave a percentage of 11.541%. The ratio of revenue dollars and cents originating in Nebraska compared to the total system revenue resulted in a percentage of 9.235%. The average for the three ratios resulted in 9.936%.

20. By multiplying \$3,373,283 system value by 47.3%, the aircraft value of \$1,595,563 was attained. This amount multiplied by 9.936% (which is the allocation formula found by following the statute as above stated) resulted in \$158,535 for the ad valorem value of the flight equipment alighting in and ascending from Nebraska. A general reduction of all values throughout Nebraska by 75% was allowed—\$158,535 was reduced to \$118,901. Multiplied by the general State mill levy of 36 (1950) and 38 (1951), respectively, gave the alleged right to assess \$4,280.44 for 1950 and \$4,518.29 for 1951 against the aircraft in question.

It is these taxes, with the continuing assessments that appellant seeks to nullify by declaring the statute (App. B) constitutionally void by the decision of this Court.

21. Paragraph 24 of the Stipulation is based on the statute in question (77-1244(1) (1246) (App. C):

“The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without of the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessor in the county in which the base is located.”

22. It will be noted that the statute refers to no mileage such as is frequently found in apportionment statutes allocating the total miles traveled within the State to the total miles over a system. No miles are traveled within Nebraska by aircraft. There is visitation only to carry on interstate commerce at the airport, where the "wharfage" is paid.

23. It was further stipulated (App. C, par. 26) that:

"The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants in intrastate to interstate business carried on by the plaintiff in Nebraska."

24. It will be noted that all figures were furnished by the appellant to the appellee and its taxing officials, as shown by paragraphs 5 to 8, inclusive.

25. Further the Stipulation shows (App. C, par. 27),

"The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year."

26. From the Stipulation it seems clear that, irrespective of the name given to the tax by the State Legislature, it must be assessed, levied, and collected for general revenue purposes of the State of Nebraska rather than used as a special tax levied for maintenance, operation, upkeep, policing, patrolling, supervising, or licensing

the appellant in reference to the flight of its aircraft in and out of the airports of Nebraska.

27. From the Stipulation it likewise seems clear that the aircraft attain no taxable situs in Nebraska. They traverse no part of Nebraska. They come in from the airways above, which are now public domain under Federal supervision, to land and take off from municipally owned runways. The Stipulation proves that charges are made by the municipality for such landings and take-offs and depot privileges at an agreed rate. This aggregated \$22,000 for 1951.

SPECIFICATION OF ERRORS

On November 11, 1953, under Rule of this Court 13(9), appellant filed herein the Points Relied Upon for Reversal (R. 49). Previously appellant filed its Assignment of Errors with the Clerk of the court below (R. 36). Reference will be made to them, should this Specification of Errors be challenged as too limited for points submitted and argued. Appellant claims the following errors are apparent from the opinion of the court below (App. A and R. 35).

1. The court erred in upholding the statute by stating:

“* * * Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. * * *”

It appears from the facts stipulated that appellant's aircraft were, at no time, "located in" Nebraska.

2. The court erred in upholding the taxing statute in question by stating:

"* * * and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state."

It appears from the facts stipulated that there is no relationship between the amount of the tax paid and the use made of the property in the State. The finding of the court contemplates some cooperation, some mutual assistance, some mutual aid, and the furnishing of facilities for the tax money to be paid, none of which benefits or facilities or uses are present in the case at bar.

3. The court erred in applying the following words in the opinion to the tax in question as a basis for its finding of validity:

"* * * interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state."

It appears from the stipulated facts that the appellant pays other taxes in the form of (a) privilege tax for the right to land at the Omaha Municipal Airport costing appellant \$22,000 a year (1951); (b) an ad valorem personal property tax upon all the personal property of the

appellant located in Douglas County, Nebraska, \$200 to \$300 a year; (c) a gasoline tax on the purchases made at the airports in Nebraska at tax cost of \$14,180 a year (1951) which tax income is used by the state to build and maintain airports in the state. There is no "use" tax for facilities except for alighting at the airport under the facts stipulated. There are no "fixed routes" to travel in this case in Nebraska upon which the state may claim a use thereof or a situs thereon.

4. The court erred in basing its opinion upon the portion of the statement above quoted, and in applying it to the facts in the case at bar, that the commerce in question "bears no undue part of the burden" of the tax in question because the formulae provide for proportional taxing. It appears from the evidence that the beginning ad valorem proportional tax in 1950 was \$4,280.44 and in 1951 was \$4,518.29. Part of the formula (App. B) to arrive at the tax was and continues to be based upon tonnage transported by air in the aircraft taxed, in proportion to the revenue tons transported by the appellant throughout the United States, and on proportioned revenue tons and revenue passengers in the same manner from interstate operations. The court erred in failing to conclude that the tax assessed violated the Tonnage Clause of the Federal Constitution (Art. I, Sec. 10, Cl. 3), which prohibits any state from laying a duty of tonnage except with the consent of Congress. On the contrary, Congress pre-empted the field of aviation and took unto itself all rights and privileges of regulation. (cf. Civil Aeronautic Code cited and epitomized above.)

5. The court erred in failing to recognize and apply the law that the Commerce Clauses of the Federal Con-

stitution (Art. I, Sec. 10, Cl. 3; Art. I, Sec. 9, C. 6 as well as Art. I, Sec. 8, Cl. 3). The vesting of exclusive jurisdiction in Congress to regulate the instrumentalities moving in interstate aerial commerce. The grant in Section 8, Cl. 3, appellant contends may not be delegated by the Congress to the states though the others might be delegated by consent of Congress. Any right to tax by a state must be for "wharfage" or airport privileges, uses of local warehouses, depots, and other facilities for which charges or taxes may be collected. None of such uses, protections, or privileges furnished by the State are involved in the ad valorem tax in question. The facts and the purpose of the tax are shown throughout the Stipulation (App. C, pars. 24, 25, 26, 27 and R. 20 and 23) to be solely for general revenue purposes, unrelated to the aircraft or the carrier in its admittedly interstate commerce activities.

6. The court erred in stating:

" * * * We find that the act is not violative of Article I, section 8, Clause 3; Article I, section 9, clause 6; or Article I, section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged."

It appears from the face of the statute in question (App. B) and the Stipulation of Facts (App. C) that the Commerce and Tonnage Clauses are definitely violated by the creation and assessment of the ad valorem tax. The tax, if unlawful, is a burden upon the industry of the appellant while pursuing interstate commerce in and out of the airports of Nebraska under the facts above stipulated.

7. The court erred in stating that the *Northwest Airlines* case, decided in 1944 (322, U. S. 292, 64 S. Ct.

950, 88 L. Ed. 1283, 153 A.L.R. 245), forms the basis for holding the ad valorem tax at bar valid. It appears that Minnesota was the State of domicile and home port of the appellant. The court said:

“ * * * The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted * * *.”

The Court upheld the Minnesota ad valorem tax on aircraft fundamentally on the facts quoted. It appears that none of such basis for the tax nor the benefits afforded from such basis are present in the case at bar.

8. The court erred in basing its decision in the case at bar on the same constitutional footing as taxation of inland barges, Pullman cars, trucks, buses, and rolling stock. It appeared that, in each instance in the cases cited in support of the opinion below, the court erred in failing to recognize that the incident of the tax or instrumentality to be taxed, by its presence within the taxing state had first attained a well-recognized taxable situs therein which alone formed the foundation for the personal property tax in each case cited. In the case at bar the aircraft, at no time during the year, attained a taxable situs within the State of Nebraska that would permit the State legally to evaluate, assess, and levy the ad valorem taxes in question. The court erred in assuming that the proportional tax in Nebraska legalized the tax in question even though there existed in Nebraska no taxable proportion of the fleet as the basis for a percentage value of an entire fleet of aircraft operating nationwide.

9. The court erred in failing to apply the established legal concept of the status for tax purposes of an ocean-going vessel coming into the port of a state while engaged in international or interstate commerce. The aircraft in question coming into the state from the air above the United States for the sole purpose of interstate commerce missions and returning in the same manner at the conclusion of its interstate mission should be adjudged the same as a seagoing vessel.

10. The court further erred in deciding that, because the domiciliary state did not or could not legally tax the aircraft, the Commerce Clause became inoperative as a protection to interstate commercial air flight throughout the rest of the United States. Only where a real tax situs has been attained in any state does the basis for taxation exist.

11. The court erred in failing to differentiate, in each of the cases cited in the opinion (App. A), the legal consequences of the issue here before the Court, i. e., Congress has established the public right of transit in the air above the United States by enacting into law the following:

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.” June 23, 1938, c. 601, Title 49, United States Code Annotated 403.

12. The court erred in its opinion by failing to recognize that the Civil Aeronautics Code, in force and effect at all times mentioned herein (June 23, 1938),

pre-empted the field of aviation to the extent of prohibiting any state from hampering or burdening the carrying out of the express purposes of the Code by levying an ad valorem tax upon aircraft, fully equipped for and engaged in flight in interstate commerce (App. B). Such instrumentality is the only means by which air commerce among the states can be effected.

13. Furthermore, the court erred in upholding the tax upon that instrumentality when it alighted at the airport designated and controlled by the Civil Aeronautics Board as the only place in which interstate aerial commerce to and from Nebraska could be effected.

14. The result of the court's errors below obviously burdens interstate aerial commerce in Nebraska.

LAW POINTS TO ESTABLISH ERRORS AS SPECIFIED

Point I.

The Commerce Clauses of the Federal Constitution (Art. I, Sec. 8, Cl. 3; Art. I, Sec. 9, Cl. 6; Art. I, Sec. 10, Cl. 3) vested in the National Congress the exclusive right to regulate commerce among the states. To levy a personal property tax by state or nation on any instrumentality while pursuing commerce among the states constitutes regulation as stated in the Constitution.

Best & Co. v. City of Omaha (1948), 149 Neb. 868, 33 N. W. 2d 150.

Gibbons v. Ogden (N. Y., 1824), 9 Wheat. 1, 6 L. Ed. 25.

Smith v. Turner (N. Y., 1848), 7 Howard 283.

"Constitutional History of the United States," by Andrew C. McLaughlin (Professor Emeritus of History, University of Chicago, 1935), pp. 398-9.

"The Constitutional History of the United States, 1776 to 1826," by Homer Carey Hacket (Professor of History, Ohio State University, 1939), pp. 371-380.

"A Declaration of Legal Faith," by Wiley Rutledge (late an Associate Justice of the Supreme Court of the United States; 1947, University of Kansas Press), pp. 72-3.

"Lectures on the Constitution of the United States," by Samuel Freeman Miller, LL.D. (late an Associate Justice of the Supreme Court of the United States; 1891), pp. 433-4, 443-9.

"The Commerce Clause Under Marshall, Taney and Waite," by Felix Frankfurter (Associate Justice of Supreme Court of the United States; 1937, University of North Carolina Press) pp. 112-14.

"The Court and the Constitution," by Owen J. Roberts (Retired Associate Justice of the Supreme Court of the United States; 1951, Harvard University Press), pp. 37-9.

Point II.

A state may levy a tax, by whatever name called, on instrumentalities being used in interstate commerce if the funds derived are in exchange for state benefits conferred; as pay for the use of facilities of the state; for protection; for reciprocal rights from the state; or for the maintenance of property used in furtherance of interstate commerce.

Bode v. Barrett (Ill., 1953), 344 U. S. 583, 73 S. Ct. 468.

Capitol Greyhound Lines v. Brice (Md., 1950), 339 U. S. 542, 70 S. Ct. 806.

City of Chicago v. Willett Co. (1953), 344 U. S. 574, 73 S. Ct. 460.

Dohrn Transfer Co. v. Hoegh (Iowa, 1953), 116 F. Supp. 177 (Before Thomas, Circuit Judge, Graven and Riley, District Judges).

Lloyd A. Fry Roofing Co. v. Wood (Ark., 1952),
344 U. S. 157, 73 S. Ct. 204.

Memphis Steam Laundry Cleaner, Inc. v. Stone
(Miss., 1952), 342 U. S. 389, 72 S. Ct. 424.

Spector Motor Service, Inc. v. O'Connor (1951),
340 U. S. 602, 71 S. Ct. 508.

Point III

(1) The National Congress may assume jurisdiction, control by licenses and penalties, regulate, and supervise the instrumentality of interstate commerce and such intrastate commerce as may affect the national administration of that commerce.

(2) When Congress does so legislate in the field of aerial navigation, interstate air commerce is pre-empted. A general revenue-producing property tax assessed by a state against aircraft on missions of interstate commercial flight while so engaged illegally burdens commerce and the administration of the Civil Aeronautics Code.

Blalock v. Brown (1949), 78 Ga. App. 537, 51
S. E. 2d 610, 9 A. L. R. 2d 476.

Chicago & Southern Air Lines, Inc. v. Waterman
S. S. Corp. (1948), 333 U. S. 103, 68 S. Ct. 431.

Lichten v. Eastern Air Lines (N. Y., 1951), 189 F.
2d 939.

Public Utilities Comm. of California v. United
Air Lines, Inc. (1953), _____ U. S. _____, 74 S. Ct.
151, 98 L. Ed. p. 99.

Rosenhan v. U. S. (C. A. 10, Utah, 1942), 131 F. 2d 932, (cert. denied 318 U. S. 79, 63 S. Ct. 993).

U. S. v. Causby (1946), 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206.

U. S. v. Drumm (Nev., 1944), 55 F. Supp. 151.

U. S. v. Perko (Minn., 1952), 108 F. Supp. 315.

Title 49 U. S. C., Secs. 401-705, Chapter 9. (This Civil Aeronautics Code has been summarized at pages 7-10 hereof.)

U. S. Code Congressional Service, Vol. 2, 1950, p. 3945. House Report No. 2709; Text of Act, Vol. 1, 1950, p. 1063; Vol. 1, p. 1084; Vol. 2, p. 3998, House Report p. 3038.

Point IV.

The decisional law denying the state of creation of a corporation the right to levy a property tax on the value of instrumentalities of that corporation used in interstate commerce, that are continuously during the tax year beyond the borders of the domiciliary state, forms no right for another state to so tax proportionately or otherwise those instrumentalities when the basic facts for a taxable situs of the instrumentality is lacking in the state of visitation.

Johnson Oil Refining Co. v. Oklahoma (1933), 290 U. S. 158, 54 S. Ct. 152.

McCulloch v. Maryland (1819), 4 Wheat. 316.

Nashville C&St. L. R. Co. v. Browning (1940), 310 U. S. 362, 60 S. Ct. 968, 84 L. Ed. 1254.

New York Central & H. R. Co. v. Miller (1906), 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155.

Northwest Air Lines, Inc. v. Minnesota (1944),
322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 956,
153 A. L. R. 245.

Ott v. Mississippi (1949), 336 U. S. 169, 69 S. Ct.
432.

*Pullman's Palace-Car Co. v. Commonwealth of
Pa.* (1891), 141 U. S. 18, 11 S. Ct. 876.

District of Columbia v. Smoot Sand & Gravel Co.
(1950), 184 F. 2d 987.

Standard Oil Co. v. Peck (1952), 342 U. S. 382,
72 S. Ct. 309.

Point V.

(1) The Commerce Clause protects owners against a state personal property tax on vessels coming from the high seas into a port within a state in furtherance of international and coastwise interstate commerce among the states.

(2) An aircraft arriving at an airport in a state from the navigable air space of the United States, alighting and ascending solely in pursuit of its interstate commerce mission, should be legally adjudged for tax purposes as if a vessel from the high seas.

(3) That such aircraft and vessels so engaged arrive and depart on regular schedules forms no legal basis to change the established law of the constitutional protection.

*John C. Hays v. The Pacific Mail Steamship
Co.* (Calif., 1854), 17 How. 596, 15 L. Ed. 254.

Morgan v. Parham (1872), 16 Wall. 471, 21 L.
Ed. 302.

SUMMARY OF ARGUMENT

The Court will find from the stipulated facts that the tax in question is an ad valorem tax on aircraft that are engaged in interstate commerce and is assessed on those aircraft when they alight in Nebraska while so engaged and consequently is void (Law Points I and V, Specification of Errors 6 and 13, 7, 9, and 10).

The tax is void because it is for neither a use, a privilege, nor for protection. Nor is it a direct benefit tax. Nor is it readily traceable as a benefit. It fails to justify for facilities or privileges which the appellant has not otherwise paid for alighting in Nebraska. The tax is invalid because the appellant pays for its landings upon the airport while engaged in interstate aerial commerce in Nebraska. Such payments are substantial and are made in accordance with an agreement with the airport authorities in Nebraska.

The appellant pays its gallonage tax on large amounts of gasoline bought for and used in its aircraft at the Omaha Municipal Airport. Such gasoline tax is used by the State of Nebraska in connection with the upkeep of airports within the State (R. R. S., Nebraska 1943, Sec. 3-148). (Law Point II, Specification of Errors 2 and 3).

From the stipulated facts it appears that Congress has pre-empted the field of aviation and has dedicated the air space of the United States, free to the citizens who engage in air commerce. Congress has otherwise pre-empted the field of aviation as to both regulation and supervision. Regulation includes the power to tax. This right remains solely in Congress under the Commerce Clause (Law Point III, Specification of Errors 4, 5, 11, 12).

The aircraft flown in and out of Nebraska attain no taxable situs within the State. The fact that the aircraft go in and out on regular schedules in furtherance of interstate commerce is the practical means of carrying on that commerce and aggregates no taxable permanency. Such visitation differs from the instrumentalities of commerce that abide and remain within the State in large numbers at all times or for great lengths of time, resulting in an attained taxable situs. The consequent proportional taxing of such property engaged in land and inland water transportation abiding within the State has no parallelism with the air commerce in question (Law Point IV, Specification of Errors 1 and 8).

The Nebraska ad valorem taxing statute directed at the aircraft engaged in interstate commerce of the appellant is void because repugnant to the Commerce Clause of the Federal Constitution (The Nebraska Statute, Ch. 77, R. R. S. Nebraska 1943, Sections 1244-1250, App. B this brief).

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ARGUMENT

Argument to Sustain Law Point I and Establish Specification of Errors 6 and 13.

The Commerce Clause, Section 8 (3), provides no exception that Congress only shall have the right to regulate commerce among the states, while the clauses in Sections 9 and 10, vest in Congress the power to give rights to the states only in matters stated in those sections.

All argument, therefore, of the powers of a state to tax the means or instrumentalities engaged in interstate

commerce are valueless unless the state tax falls within permissive exceptions upheld by decisional law of this Court.

The subject matter of this case is an aircraft, fully equipped for and carrying on commerce among the states. Thus an exception to the Commerce Clause must be made if the ad valorem tax of the State of Nebraska on such aircraft is to be upheld.

In the *Northwest Airlines* case the Minnesota tax on the aircraft was upheld because the airline received benefits and protection in exchange for the tax by the domiciliary state. Also within that state the total fleet of aircraft was required to return and did return to the state for purposes other than interstate commerce. The case involved primarily due process of law. The *Northwest Airlines* case will be discussed fully under Law Point IV establishing Specification of Errors 1 and 8.

The Supreme Court of Nebraska understands the application of the Commerce Clause. It stated it in the *Best & Co.* case, which involved the right of the City of Omaha to levy a tax designated as a license on a corporation seeking to carry on business within the state, which involved interstate commerce, without paying for the right or privilege required by city ordinance. The definition should have been applied to the appellant airline corporation in its interstate business in the State of Nebraska. The Court's failure to do so resulted in the Specification of Errors 6 and 13. The Nebraska court properly held in the *Best* case as follows:

“ * * * The court held that the power granted to Congress to regulate commerce among the states being

exclusive when the subjects are national in their character, and admitting only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. In the opinion the court said: 'In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.'

"The court further held that interstate commerce cannot be taxed at all by a state even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.

* * * * *

"We conclude that the ordinances in question directly and unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 of the Constitution of the United States."

There should have been no difference in reason or in principle for applying the Commerce Clause differently in the case at bar by the same Court.

The *Gibbons v. Ogden* reasoning and conclusions may be changed only by amendment to the Constitution of the United States. The opinion has stood since 1824. It applies as soundly to the aircraft today as it did to the vessels then. In fact, Chief Justice Marshall said in the opinion that a state had no more right to tax or regulate the vessels "than if they were wafted on their voyage by the wind." 9 Wheat. 1, 6 S. Ct. (Curtis) 23. The sole

power of Congress to regulate "commerce among the states cannot stop at the external boundary line of each state but may be introduced into the interior." He also stated:

"These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they did not purport to restrain."

Furthermore, and directly applicable to aircraft, Chief Justice Marshall said:

"But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly established the right of congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. * * *"

The evidence in the Stipulation of Facts and in the findings in the opinion below fail in the effort to remove the aircraft in question from the category of the navigation defined by Marshall.

Smith v. Turner, known as the passenger cases, occupying 176 pages of opinions, explains the elementary function of all the Commerce Clauses. If the Nebraska tax is upheld, then each state may impose taxes as irregularly and as differently as there are states in which the aircraft alight in pursuit of interstate commerce. One of the basic reasons for the constitutional provisions is illustrated in *Smith v. Turner*:

"* * * The tax must be uniform throughout the union; consequently, the exercise of the power by any

one State would be unconstitutional as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these provisions of the constitution operate only on the federal government, and the States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the constitution has failed to accomplish the great object of those who adopt it.

“These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in congress; and it is as binding on the States as any other exclusive power with which it is classed in the constitution.”

When the Nebraska court said that it found the act not violative of the Commerce Clauses “on the basis on which it is here challenged,” reversible error was committed. The court below erred when it gave no heed whatever that Congress had pre-empted the field of aerial commerce and that the tax in question casts a burden on the instrumentality as well as to hamper and burden the execution of the Civil Aeronautics Code. Basically, the Nebraska tax is void as repugnant to the Commerce Clause of the Federal Constitution.

Professor Homer Carey Hacket in his cited history in 1939 states on page 372:

“The reasoning of counsel in *Gibbons v. Ogden* was epochal in character, due in part to the novelty of the questions discussed but also in large measure to the fact that several of the ablest lawyers in the country were engaged in the case.”

The author further commented upon Webster’s argument in the following language:

“Webster’s argument, without quite rejecting outright the concept of concurrent power, tended distinctly towards the conclusion that the power to regulate commerce was by nature indivisible. ‘All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.’ He evidently believed that the admission of the states’ power to deal with a commercial matter on the ground that Congress had not yet done so would defeat the purpose of the constitutional provision, which he held was to empower Congress gradually, as need arose, to develop a system. State legislation, by regulating that which Congress intentionally left unregulated, would clash with the congressional plan. It was consequently incompatible with the congressional power of regulation.

* * * * *

“Marshall, in giving the opinion of the court, first defined the word commerce broadly, as including navigation. * * * This principle is, if possible, still more clear when applied to commerce ‘among the several states. * * * The power of Congress * * * comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes.’ * * *”

The late Honorable Wiley Rutledge in 1947 wrote in his cited “A Declaration of Legal Faith” at pages 72-3:

“The commerce clause has been by no means perfect in its application and administration. Some large blunders there have been; others no doubt will be. But on the whole the clause has accomplished its great objective. From the disunited states of 1786, which interstate trade barriers had created, has grown the United States of 1946. No small part of that growth

has been due to the effects of the commerce clause and its administration. Perhaps no other constitutional provision has played a greater part.

“That part must continue if the nation would remain great and democratic. A balkanized America today would be vulnerable to attack from without and would be unequal to maintaining our people within. Our dream comprehends something more than a subsistence level of living. For tomorrow as for yesterday, it can be realized only by giving the commerce clause its originally intended application.”

Honorable Samuel Freeman Miller, LL.D., formerly Justice of the Supreme Court of the United States, in 1891 said at page 433 in his cited lectures:

“The text of this discourse is one of the most important of the powers delegated to Congress by the Constitution of the United States.”

Then he set forth Article I, Section 8, Clause 3 at pages 434 and 443-5 and logically analyzes it as follows:

“You would scarcely imagine, and I am sure you do not know, unless you have given some consideration to the subject, how very important is that little sentence in the Constitution. It was the want of any power to regulate commerce, as between the States themselves, and with foreign nations, which as much, and I am not sure but I am justified in saying more, than any one thing, forced the States to form the present Constitution in lieu of the Articles of Confederation under which they had won their freedom and established their independence. * * *

“From that time until the present the efforts of the individual States to take advantage of their opportunities to impose duties, taxes, restraints, and burdens upon the property of citizens of other States passing through or brought into them have been the source of the continued exercise of the jurisdiction

of the Supreme Court of the United States, where such laws have in almost every instance been declared void. For example, the statute in the case of *Guy v. Baltimore*, 100 U. S. 434, was an old sinner, and made a very clever attempt to conceal the evil. It appeared that the city of Baltimore owned some wharves in that city at which vessels coming to that port landed: probably not all, but some of them, and imposed a certain tax for the use of those wharves. This was begun a great many years ago, and was done by an act of the General Assembly of Maryland, passed in 1827, and regulations made thereunder by the city authorities, which provided in effect that all articles of merchandise brought into that city and landed at its wharves, which were the produce of the State of Maryland, should pay no fees on account of their use, but that all similar articles brought into that port from any other State should pay a tax for the use of the wharf upon which it was landed. Of course it was a small affair, the main business of these wharves being the landing of chickens, eggs, potatoes, cabbages, oysters, and other articles of food and things of that kind, so that the sum that any one little sailing vessel had to pay did not amount to much. Nobody, therefore, resisted its payment until a few years ago, when a man was at last found who would stand it no longer. In 1876 Guy, a resident citizen of Accomac County in the State of Virginia, landed his vessel at one of the public wharves, and when this tax was demanded of him refused to pay it. * * * It was invalid as a regulation of commerce. It was not merely intended to raise money for the use of a wharf,—that they had a right to do, and if they had laid a reasonable tax for its use and laid it alike upon the produce which came from every State in the Union, it would have been a valid tax; but it was evident that it was intended by this statute to make the produce and goods of Virginia, which lies right alongside, as well as that of the adjacent States of New Jersey and Delaware, which came into

this port for a market, pay a tax to keep up the wharves and wharfage system of that port, while permitting the entry of goods and produce from the State of Maryland free of any such imposition. This was held to be a regulation of commerce, and though of nearly sixty years' standing, to be void."

From this learned Judge's writings we can visualize today, with the start that Nebraska has made in the taxation of aircraft, unless stopped, other states will follow. States will vie with each other. States of creation and home port states may exempt aircraft entirely from taxation. The rate of levy and valuation placed upon the same aircraft will lead to the confusion that James Madison and the others sought to stop when the Commerce Clause was submitted to the people and ratified.

The Commerce Clause has peculiar application to aviation. It may be now as has been likened and compared with the vessels coming in from the high seas. That similarity is discussed and argued under Law Point V and Specification of Errors 7, 9, and 10.

The Honorable Felix Frankfurter in 1937, in his cited work, "The Commerce Clause Under Marshall, Taney and Waite," approved the following statement made forty years previously by the Honorable James Bradley Thayer:

" * * * As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they were finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Consti-

tution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country.' "

The majority and concurring opinions in *Northwest Airlines* clearly suggest the reasons for this Court to give full effect to the Commerce Clause to nullify the Nebraska statute.

The cases that might seem on the surface to open the way for the destruction of the Commerce Clause as a protection to aviation are explained and argued under Law Point IV which establishes the errors specified in paragraphs 1 and 8 pertaining to land and inland water commerce.

The Honorable Owen J. Roberts, in his cited work, "The Court and the Constitution," in 1951, stated:

"The exercise of the power of Congress to regulate can neither be enlarged nor circumscribed by

state action. Congress has the choice whether to prescribe that which supports state policy or that which runs counter to it."

These learned pronouncements on the constitutional provision prove one outstanding thing: Congress and Congress alone has the right to impose a tax upon aircraft engaged in interstate commerce. Congress might base such tax for the use of the aerial navigation facilities provided by the government. This will be fully explained and argued under Law Point III wherein error is established in the Specification of Errors 4, 5, 11, and 12.

Justice Roberts in the cited work concludes:

"Thus, though Congress has not legislated on the subject, it has been held that a state may not tax the transaction of interstate business and may not impose burdensome regulations on that business. Nor can the state interfere with or obstruct interstate travel."

There appears to be lacking a sound theory upon which the State of Nebraska imposed its ad valorem tax upon the aircraft as instrumentalities of interstate commerce. From the foregoing pronouncements of great authorities, we may conclude they would pronounce the Nebraska statute repugnant to the Commerce Clause of the Federal Constitution, under the admitted facts.

Argument to Sustain Law Point II and Establish Specification of Errors 2 and 3.

Seven cases have been selected for Law Point II to demonstrate state's rights to tax instrumentalities or the owners thereof engaged in interstate commerce. All these cases have been decided within the past four years. These

cases and many companion cases are the authority that the Commerce Clause fails as a defense to state taxation that is based upon the use of state facilities. The cases hold that there must be a close relationship between the tax and its benefits; there must be a readily distinguishable benefit conferred by the state; there must be certainty that the money derived from the tax will find its way, through no circuitous route, to reach the benefit bestowed upon the taxpayer.

The "use" question arises mostly, but not entirely, from the fact that the old roads, fraught with mud and ruts, were made by the states into well-paved and well-policed and protected highways. Obviously, by the invitation of the state, benefits were derived from the interstate use by trucks, buses, and automobiles on the new highways. However, the "use" tax has been definitely held invalid in cases where the relationship to benefits was lacking. In *Capitol Greyhound* the court reviewed, beginning in 1915, fifteen cases up to 1947. Of those, ten were held valid and four invalid. Those that were held invalid contained this notation: "Invalid as not being for the privilege of road use," or "Invalid as excessive in amount in relation to such expenses" (Morf), or "Invalid because the formula bore no reasonable relation to road use" (Dixie).

In the *Bode* case (1953) the emphasis in the argument was on the Commerce Clause. The state tax on such motor vehicle, to be valid, must be measured by or have some fair relationship to the use of the highway for which the charge is made. The majority opinion recited that the Commerce Clause as a defense against validity

was baseless, even though the factual evidence tendered by the appellant road users was not analyzed. Some of the interstate carriers in the case did an intrastate business as well; and as the tax was required for all vehicles that moved on the highways, it was adjudged to be a tax for the privilege of using the highways of Illinois. Furthermore, no showing was made by any of the appellants that the tax bore reasonable relation to the use made of the highway in the interstate carrier's intrastate operations.

In the case at bar the Stipulation of Facts is available to show the full story concerning what actually does transpire between Omaha and Lincoln and between Lincoln and Omaha on four of the fourteen flights and what percentage of the total is local business. It is insignificant. Furthermore, if the State cares to find some constitutional way to tax local business, even though carried on by an interstate instrumentality, that is a matter of no concern in this case.

The concern is with the right of the State of Nebraska to levy an ad valorem tax upon an aircraft engaged in interstate commerce which use no state facilities. Obviously, the use tax case is constitutionally valid only if the tax is in exchange for state benefits conferred or as pay for the use of facilities, for protection, for reciprocal rights, or for the maintenance of roads and highways and other facilities used by the interstate carrier.

The evidence surrounding the flights of aircraft in and out of the airport, and the tax purpose make it obvious that the Nebraska tax in question bears no rela-

tionship whatever to the uses and privileges that were sufficient to sustain the tax in such of the seven cases cited where a state tax was upheld.

The *Willett Co.* case (1953) in Chicago involved a typical road tax, and therefore it was upheld even though there were strong dissenting opinions even in that case because of the impact of the Commerce Clause. The dissenters emphasized that the tax should not be levied upon those carters that were doing an interstate business when the intrastate business and the interstate business were, from the evidence apparently, readily discernible. The Illinois court held the Chicago ordinance invalid because it required an annual license tax on every truck that used the highways in and out of Chicago as well as only within Chicago. If a discernment between intrastate and interstate business would enlighten the court the taxpayer failed to make it.

“* * * It was a tax intended to fall on business done within the city that levies it, although in part it is imposed on carriers of intrastate and interstate commerce inseparably commingled.”

It was a tax for the use of the highway. It was for the courts to determine, as a matter of law, whether the highways were or were not used by the taxpayer. It was for the taxpayer to prove that he made no use of the highways of Chicago for which the tax was levied.

In the *Lloyd A. Fry Roofing Co.* case (1952) this Court was presented with the complaint of truck drivers owning and operating trucks for hire within Arkansas. Before using the highways, truck drivers were required to obtain a permit, and it made no exception for any

user. The money obviously was used for highway purposes. There was no discretion lodged in the State of Arkansas to determine whether it should or should not grant the permit. A permit based on convenience and necessity requiring state discretion would be void. This case is cited to emphasize further that the Nebraska tax is neither a permit nor a license to use anything that Nebraska has to furnish. It is the reasoning advanced by the advocates of the validity of the Nebraska act that prompts this full discussion of use tax cases.

In late 1953 a three-judge federal court in Iowa, in the *Dohrn* case cited, exhaustively examined the types of licenses, permits, and taxes that are or are not repugnant to the Commerce Clause of the Federal Constitution. Generally, if anything is left to the discretion of the state, the tax is void as being repugnant to the Commerce Clause as applied to interstate carriers. This is true even though such interstate carrier crosses over and into parts of the state and while in the state does an intrastate business.

Again by analogy, the Nebraska tax in question, by whatever name called, cannot be held valid as a benefit tax. The opinion below even applies the word "use" to operations of the aircraft in Nebraska. Nor was the writer of the opinion below able to escape the phrase, "in and through the State of Nebraska," when applied to the aircraft. These expressions prove reversible error when the factual situation that there was no "use" and no commerce "in and through" the State by the aircraft as shown by the Stipulation of Facts.

Not always has the High Court held taxes for the use of state highways valid. Some have been held repugnant to the Commerce Clause of the Federal Constitution. The *Spector* case is an example for the invalidity in the instant case. The *Spector* case held the Commerce Clause nullified

“a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State when (1) the business consists solely of interstate commerce, and (2) the tax is computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. For the reasons hereinafter stated, we hold this application of the tax invalid.”

The Nebraska tax in question, if it is anything, is actually for the privilege and the right to do interstate business in Nebraska in air commerce. It might well be reasoned that some tax should be paid for the right to do business within the State because of the business benefits to appellant and that the privilege of picking up passengers, freight, mail, and express at the Omaha airport and moving them out of the State, even in interstate commerce, results in a benefit that flows from the State of Nebraska to enrich the appellant.

It may be argued, then, why should not Nebraska be entitled to require the appellant corporation to pay its share of the general upkeep of Nebraska, for without general taxes there could be no efficient state government. The answer is set forth under Law Point I, i. e., that the Commerce Clause of the Federal Constitution prohibits that very argument as the basis for upholding a general revenue-producing tax, such as the Nebraska act in question. The exceptions are set forth among the

seven cited cases. The difference is made clear in the *Spector* case. The Nebraska statute bears no relationship to the use of facilities, or other reciprocal benefits.

The tax in question is not a privilege tax upon the intrastate business that is done by the appellant herein in Nebraska. It is not an income tax based upon that intrastate business. It falls outside the category of pay for any facilities that Nebraska has furnished. Consequently, it can result in only a void general tax, no matter how favorable the argument may seem to be in its behalf as beneficial to Nebraska.

The *Spector* case concludes with the following significant pronouncement of the High Court:

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland*, supra" (4 Wheat. 316, 425-437, 4 L. Ed. 579).

No doubt the appellant airline solicits business in Nebraska. It does so as a foreign corporation, maintains no shops, no warehouses, no repair depot, no airport of its own and no executive offices. It carries no large bank balances in the State. Yet it derives a substantial income from the State of Nebraska, as shown by the tax formula, which comes only through its solicitation of business in the State. Such facts will not sustain the tax in question against the protection of the Commerce Clause.

In the *Memphis Steam Laundry* case cited the late Chief Justice Vinson delivered the opinion of the Court

and held the tax invalid and reversed the state court, which had held as follows:

“ * * * The tax involved here is not a tax on interstate commerce, but a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and non-residents alike.”

The High Court opinion stated:

“The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not ‘a tax on interstate commerce’.”

The Court held that it was a tax on interstate commerce and therefore repugnant to the Commerce Clause and the law held invalid.

This *Memphis Laundry* case is cited in an effort to bring out the fact that no matter what the label might be on the Nebraska tax this question must be answered: Just what is the purpose of the tax? If it were permissible to tax the appellant as a nonresident of Nebraska, for sending its aircraft from the nontaxable air space above the United States down to Nebraska to pick up passengers and cargo solely in intrastate commerce, which business had been solicited ahead of time in Nebraska, then perhaps there might be some validity to a tax on the vehicle.

In deference to the Commerce Clause of the Federal Constitution, the *Memphis* case is authority for the fact that the soliciting of business within a state by one not licensed therein but doing an interstate business, of which the solicited business is a part, is protected by the Com-

merce Clause, and such tax levied upon one's trucks or the individual person doing the solicitation is void under the Commerce Clause. The opinion sums up as follows:

"To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

Appellant maintains that the Nebraska tax is a burden upon interstate commerce and an obstruction to the administration of the Civil Aeronautics Code and is void.

**Argument to Sustain Law Point III and Establish
Specification of Errors 4, 5, 11, and 12**

This point and the Specification of Errors pertain to a statutory fact, i. e., Congress has heretofore pre-empted the field of aviation. The Civil Aeronautics Code became effective June 23, 1938. What effect does such pre-emption have upon the validity of the tax in question? Admittedly the tax is upon an instrumentality that is covered by the National Act. Appellant's aircraft fully equipped for flight, by the very wording of the state statute, while engaged in interstate commerce, are the incident of the tax. The findings of the court below and the Stipulation of Facts between the parties so prove (App. B and C).

Appellant presents pre-emption from the standpoint that nothing is left for the state to confer by way of

benefit for the tax, and the state is denied the right to tax the aircraft for general revenue purposes.

In the *California-United Air Lines* case cited, decided by this Court in late 1953, the Public Utility Commission of California would seem to have jurisdiction of rates in reference to air transportation within its own jurisdiction, ~~but it does not~~. It does in reference to land and inland water transportation within its boundaries unless the intrastate materially affects interstate commerce by placing a burden thereon. But not so with aerial transportation. By the Civil Aeronautics Code Congress pre-empted aviation, ^{but not} in reference to the matter that was claimed before the California Commission.

The Civil Aeronautics Code has been summarized for the convenience of the Court on pages 7 to 10 hereof.

The ~~for current~~ ^{dissecting} opinion in the *California-United Air Lines* case stated:

"* * * There is that kind of jurisdictional controversy here, for a federal agency claims that a state commission may not act because Congress put the matter exclusively in the federal domain. In a case less clear than this we enjoined state proceedings after concluding that Congress had pre-empted the field. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447. By the same token we should settle this controversy at this early stage. By denying relief we advance no cause except that of litigation."

The Civil Aeronautics Act goes farther than to pre-empt the field of aviation activities throughout the United States. It covers intrastate aviation activities as well,

as will be found in the cited cases under Law Point III. Some of these will be reviewed herein.

To bring the pre-emption closer as a basis for the invalidity of the state tax in question, the Civil Aeronautics Code recites in Section 403 (52 Stat. 980, 49 U. S. C., Chap. 9),

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit of air commerce through the navigable air space of the United States. June 23, 1938, c. 601, Title I, § 3, 52 Stat. 980.”

Thus, two parts of the Civil Aeronautics Code are before this Court for consideration in reference to the ad valorem tax on aircraft imposed by Nebraska while aircraft are engaged in interstate commerce. The federal law places the aircraft in question in all its movements into the public domain. This holds true when it flies over and around the air space above Nebraska. Aircraft do not fly through Nebraska in any sense of the word. They alight in Nebraska at the airport, for which appellant pays a substantial charge or use tax, as shown in the opinion below as well as in the Stipulation of Facts.

In the *Blalock* case cited, Georgia had enacted a recording statute. The Civil Aeronautics Act also had a recording requirement for aircraft which governed over a state recordation act. The highest court of Georgia held:

“The appellate court, reversing a judgment for plaintiff, held that the Civil Aeronautics Act was applicable, although the airplane was operated and intended to be operated only in intrastate commerce,

and hence that the unrecorded prior transfer to the plaintiff was not good as against the defendant."

This case is cited to illustrate an instance where a state gave or assured no priorities in state benefits in reference to aircraft transfers within the state.

In the *Causby case* (1946) the High Court construed the Civil Aeronautics Code in reference to flights over private lands so low as to cause injury to the property of the owners thereon. The important pronouncement in the case by this Court is as follows:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."

In many of the cases, even after 1938, the declaration (Sec. 403) in the Civil Aeronautics Code was overlooked entirely. Some state cases assume states continued to have jurisdiction over the air above them. But they have not. Nebraska has no such jurisdiction. No safety measures for flight are created from the funds derived from the tax in question.

The *Lichten case* (2 C. A., 1951) involved the loss of jewelry by an air passenger who claimed it was lost by

the mishandling of the plaintiff's baggage in New York. The Court of Appeals held:

"A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. * * * To achieve this, it is essential, in the judgment of Congress, that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services."

Pre-emption supplies what formerly was state protection. Another step into the national jurisdiction is proven.

In the *Rosenhan* case certiorari was denied. *Rosenhan* was found guilty of flying his aircraft without obtaining a certificate of airworthiness required by the Civil Aeronautics Code. His defense was that his operations were purely intrastate and his flights were in and out of an airport within the state of Utah. He further claimed that under the Tenth Amendment to the Constitution the rights in question were reserved to the sovereign state of Utah, but the Court of Appeals held that the rights were in the Federal Government under the Commerce Clause and further that the Civil Aeronautics Board was supreme in carrying out the Congressional Act.

The defendant's answer

" * * * admitted that on the dates specified he operated a civil aircraft in the designated airway without having currently in effect an airworthiness certificate for the said aircraft from the Federal authority, as authorized by Section 603(c) of the Act, 49 U. S. C. A. § 553(c), but alleged that there was currently in effect, on the specified dates, an airworthiness certificate on said aircraft issued by the

Utah State Aeronautics Commission, and that his operations of the aircraft, although within the federally designated airway, were wholly within the state of Utah, were not a part of interstate or foreign air commerce, and did not remotely affect interstate commerce."

The court stated:

" * * * The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

" * * * if the Act bears some reasonable and rational relationship to the subject over which it has assumed to act, the power is supreme and may not be denied, although it may include within its scope activities which are intrastate in character. * * *"

The defendant was adjudged guilty of having violated the C. A. Code.

In the *Drumm* case cited a similar holding was made in 1944 under similar circumstances by the United States District Court in Nevada, and likewise in the *Perko* case in 1952 in Minnesota. The latter case proves the field of aviation has been pre-empted to the extent of the Civil Aeronautics Authority being clothed with the power to prevent aircraft from flying over certain parts of the State of Minnesota. This proves that the Federal Government, while dedicating the air space above the United States to citizens, retains and reserves to the National Government the control of aviation even to the extent of prohibiting flight over parts of a state in intrastate flight.

This theory was made clear in the *Waterman* case (1948) when this Court held that even judicial review

in connection with matters affecting civil aeronautics under the act of 1938 may not follow the pattern of foreign commerce by rail and water; that air commerce has been placed in an exclusive category of its own and has removed air commerce from laws that are applicable to land and inland waters. The High Court stated in reference to the Civil Aeronautics Code as follows:

“Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is ‘interstate air commerce,’ ‘overseas air commerce’ or ‘foreign air commerce,’ each being appropriately defined. 49 U. S. C., § 401(20), 49 U. S. C. A. § 401(20). All carriers by similar procedures must obtain from the Board certificates of convenience and necessity by showing a public interest in establishment of the route and the applicant’s ability to serve it.

* * * * *

“We find no indication that Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of

local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While transport by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern government, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit."

Upon principle and authority, the State of Nebraska may not justify its *ad valorem* tax for revenue purposes upon any protection, civil or criminal, that it grants to aircraft of the appellant flying in and out of Nebraska in interstate flight. Under the comity between states permitting movement of citizens and their property back and forth across the United States, each State owes to the other the ordinary protection, rights, and privileges afforded to all persons, for which no tax is required. Automotors traveling in interstate commerce across Nebraska are entitled to some police protection and to share in the general welfare and are free from taxation therefor. It should apply to aircraft as well.

If, in the operation of the aircraft in question over Nebraska or at the airport, there should be liability for property or personal damages, either party would be en-

titled to a hearing in the federal court, or possibly before the Civil Aeronautics Board, or possibly in the State courts of Nebraska. Here, again, comity comes into play. The tax in question should not be upheld because of individual rights that may arise in such circumstances. Other nonresident litigants are not taxed for such judicial services.

Certainly with the field of aeronautics pre-empted, there exists no basis for the ad valorem tax on the aircraft.

Reference has been made to the text of various appropriations under Law Point III to prove that Congress continues to aid airport development throughout the nation as well as aid in the further and better development of the very aircraft that is the subject matter of this lawsuit. Congress fosters greater experiments for the protection of the public that avail themselves of flight. Accordingly Congress has provided for supervision and experiments at the expense of the government. Persons are trained by the government for inspectors and supervisors for service over all aerial commerce throughout the nation.

Under such state of the law and the admitted facts, any interference by property tax on aircraft flying in and out of Nebraska is a burden upon commerce and hampers the administration of the Civil Aeronautics Code.

Appellant concludes that the pre-emption voids the tax. Most certainly it does so when construed in conjunction with the Commerce Clause applied to aerial

flight and aircraft in interstate commerce under the supervision, direction, and control of the Civil Aeronautics Code

**Argument to Sustain Law Point IV and Establish
Specification of Errors 1 and 8**

Under this Law Point IV appellant answers the errors in the opinion of the court below that the tax in question being an apportioned tax to reach the valuation of the aircraft for ad valorem tax purposes and the aircraft abiding within Nebraska is therefore valid.

Cases are cited in the opinion below, such as *Ott, Pullman, Standard Oil v. Peck, Johnson Oil*, and others which appellant has collected under Point IV. Those cases have the question of a proportional tax involved. The court below held the tax in question valid because it was an apportioned tax, and therefore a fair one.

It becomes necessary, therefore, to point out the differences between the case at bar, which has to do solely with flight in the public domain under the jurisdiction of the Federal Government, and land and inland water commerce, that lies solely within the jurisdiction of the taxing state. All the cases under Point IV have to do with the valuation of personal property for tax purposes used in interstate commerce and taxable because lying within the state sufficiently to attain a taxable situs therein.

The principle involved and which should properly be considered at this point in the brief is the status of the thing to be taxed by a state—the aircraft. Obviously a state may tax personal property within its borders only if that personal property has attained a taxable situs

within the state. The question of proportional valuation, therefore, is secondary to the primary question that first must be answered whether or not a taxable situs of the aircraft exists as defined in the law.

Later under this Point IV will be discussed the power of the state of creation of a corporation to levy taxes upon that corporation which it has placed into being under its laws, such as *New York Central*, *Northwest Airlines*, and as further exemplified by the exceptions set forth in *Standard Oil v. Peck*.

In the *Johnson Oil*, *Nashville-Browning*, *Ott*, *Pullman*, and *Smoot* cases and every other case of similar setting where the ad valorem tax on property was upheld, it was upheld only upon evidence that the taxed property had attained a taxable situs within the state. The proportional taxing theory followed to aid in the holding of validity by obtaining a proper and legal valuation.

For example, in the *Johnson Oil* case the court held:

"The basis of the jurisdiction is the habitual employment of the property within the state. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the state is subject. When a fleet of cars is habitually employed in several states—the individual cars constantly running in and out of each state—it cannot be said that any one of the states is entitled to tax the entire number of cars regardless of their use in the other states. * * *

"Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were em-

ployed in other states where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the state."

Illinois was the State of creation. The oil refineries were located in Oklahoma. There were present in Oklahoma, according to the decision, a large number of cars at all times using the facilities of the State in land commerce. The operation of tank cars and the refining of oil have never been pre-empted by Congress. By their very nature such instrumentalities remain within the State for long periods of time under state protection.

In the case at bar no such situation exists as with tank cars carrying oil from and to refineries in the taxing State. The aircraft in question at no time attained a taxable situs within the State. The peculiar nature of the aircraft as the incident of the tax precludes a taxable situs. The aircraft in question came in on fourteen regular schedules, but they did not traverse the highways or the byways of the State. They paid for the privilege of landing from the public domain at the Omaha airport to the extent in 1951 of \$22,000. This privilege of landing at the airport and using the depot may be likened to the right of wharfage set forth in *Gibbons v. Ogden* and approved in *McCulloch v. Maryland*. The principle announced in both these great cases places the aircraft of appellant beyond the taxing jurisdiction of Nebraska, while the principle announced in the *Johnson-Oklahoma* case places the power to tax property attaining a tax situs therein squarely within the power of the state.

The *Pullman* case in 1891, which is the forerunner of the proportional taxing theory, recognizes at the outset that it is necessary to have a taxable situs first:

“ * * * Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs,—their home port, and the domicile of their owners. * * * ”

The above quotation from the *Pullman* case includes the statement that certain instrumentalities may be taxed only at “their home port, and the domicile of their owners.” In this last phrase theoretical taxation comes into question. In the home port state (which might also be the state of creation) personal property that is outside the taxing jurisdiction of the state throughout the tax years may not be taxed as property within the state.

In the *Peck* case the Court said:

“ * * * The vessels neither pick up oil nor discharge it in Ohio. The main terminals are in Tennessee, Indiana, Kentucky, and Louisiana. * * * The vessels were registered in Cincinnati, Ohio, but only stopped in Ohio for occasional fuel or repairs.”

Ohio was the state of domicile. The tax was held invalid on vessels continuously away from Ohio.

In the *Ott* case the barges, tugs, and vessels were sought to be taxed by the State of Louisiana because the vessels, tugs, and barges were present in Louisiana sufficiently to attain a taxable situs therein. They came there to transact business within the state, but could do so only by remaining there for long periods of time and using state facilities. A similar status fails to support the decision below. The barges and ships that were anchored in Louisiana had attained a taxable situs therein. Not so with the aircraft.

The opinion that validated the Louisiana ad valorem tax was based upon the following statement by the court:

“ * * * It is said in this case that the visits of the vessels to Louisiana were sporadic and for fractional periods of the year only and that there was no average number of vessels in the state every day.”

The district court denied the right to tax. The United States Supreme Court said, in reference to the facts re situs in Louisiana:

“We do not stop to resolve the question. Louisiana’s Attorney General states in his brief that the statute ‘was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.’ * * *”

The district court did work out the formula of the number of miles that the barges in question traversed the streams; the number of miles they travelled in Louisiana; the amount of time tied to the wharves in Louisiana as compared to the same factors outside the state. The district court denied the tax. The proportional theory to arrive at the valuation of the tugs and barges was

held by the United States Supreme Court to be proper, but only on the basis that barges and tugs had attained a permanent situs within the State of Louisiana. Thus the distinction with the aircraft in the case at bar, which attained no taxable situs whatever within the State of Nebraska. Aircraft alighted from its own domain only at the airport on interstate business, then ascended into its own domain.

If the aircraft traveled about the lands of the State, crossed over its borders in and out of the State, and were tied up here and there in its interstate and intrastate business and attain a taxable situs within the State, gauged the same as other property, a different question would arise. The incident of the tax precludes such analogy. It cannot be said, in applying the proportional theory to arrive at valuation in reference to rolling stock and tugs and barges on inland waterways, that the manner in which the aircraft came to Nebraska and left Nebraska are akin. Nor should the nontaxable situation be diverted into a taxable one because the aircraft came to Nebraska and alighted to load and unload interstate passengers for from five to twenty minutes each time on regular schedules.

Louisiana had something to exchange for the tax in the *Ott* case. It gave its protection. It had to consider the taxable situs of other tugs and barges engaged in the same kind of business, but kept within the borders of Louisiana.

In the case at bar the Nebraska statute itself specifies that only the interstate aircraft are subject to the proportional property tax in question. The aircraft that are

based at one airport in Nebraska pay the regular ad valorem tax on the appraised value of each aircraft the same as on the appraised value of other personal property located in the state.

In the *Nashville Railroad* case (1940) cited, the principal question was over the amount of the assessment and whether or not under the proportional taxing theory based on a percentage derived from mileage within the state and mileage without the state, the railroad was discriminated against. The question arose under the Due Process Clause and the Equal Protection Clause of the Federal Constitution. The Commerce Clause was only incidentally raised. The Court held that the property must have a taxable situs within the state if the method of assessing the property within the state on a proportional theory to find valuation is to be valid. The Court stated:

“ * * * In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Wallace v. Hines*, 253 U. S. 66, 40 S. Ct. 435, 64 L. Ed. 782. In the light of these principles, Tennessee has not overstepped its bounds.”

In the *Smoot Sand & Gravel* case the property to be taxed and evaluated on a proportional basis or a mileage basis within the District of Columbia was found to have a taxable situs within the state. Mr. Justice Fahy, for the Court of Appeals, said:

“ * * * By virtue of their extensive, habitual and continuous use in business in the District of Columbia, we think these properties have a tax situs here. They are in a tax sense more or less perma-

nently located in the District though not always here in the same permanent sense as real estate."

The opinions of the District Court and the Court of Appeals in the *Smoot* case clearly set forth that the tugs and barges were in motion in the District of Columbia practically all the time, or were tied up to the wharves in the District. *Smoot* sought to escape the District taxation simply because it also made trips into Maryland carrying sand and gravel and building materials with the same instrumentalities and did so frequently.

None of these instrumentalities may be likened to the aircraft because in each cited case, as repeatedly stated herein, the vehicles for land or inland water commerce readily attain a taxable situs within the state sufficient, as a matter of fact, for a court to rule as a matter of law that a genuine taxable situs existed rather than a mythical or theoretical situs for taxation.

In the *Northwestern Airlines* case (1944) the majority and concurring opinion states important principles of law applicable to the case at bar. The *Northwest* case dealt with a tax on aircraft. It was an ad valorem tax. Minnesota adjudged the valuation of all aircraft and held all were within the state on May first or sufficiently within the taxable year 1939, and taxed accordingly.

The State of Minnesota was the state of creation or domicile and also the home port of the airline to which port every aircraft was required to return for purposes other than interstate flight. Under the Civil Aeronautics Code those airplanes, just as in the case at bar, were required after fifty hours of flight to return for government inspection to the home port. There, at St. Paul,

every part of the plane itself, all its removable equipment, the pilots, and other personnel, were relicensed by the government after inspection, tests and examinations. Each engine was required to be overhauled and, wherever CA inspector determined, block-tested for a number of hours outside the plane. Whenever planes were idle or otherwise laid up, they were stored at the home port at the Minneapolis-St. Paul Aid Field. The same situation applies to appellant's aircraft, as its "home port" is likewise the same air field at St. Paul.

The facts in *Northwest* warranted the High Court in holding that the ad valorem tax on the aircraft should be based upon Minnesota being the home port and the state of creation; that the planes were within Minnesota for taxable purposes for long periods of time and continuously throughout the year. Whether taxed elsewhere or with what effect on the Minnesota tax was not before the Court for decision. So the aircraft of Northwest Airlines were taxed under the following statement by the Court:

"* * * On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. * * *"

Nebraska is neither the home port nor State of domicile of appellant.

In *Standard Oil Co. v. Peck*, as above stated, theoretical taxation by Ohio was urged because the state of creation as well as the home port state, was Ohio. The Court held Ohio could make no valid claim that the tugs and barges were within its borders during the taxable

year. Ohio was denied the right to tax except for a number of the tugs and barges that the evidence showed were present and attained a taxable situs within the State of Ohio. The all-important taxable situs governed the decision regardless of domicile of the owner or abode of the tugs.

In the opinion in the *Northwest* case, pronouncements were made to the effect that the proportional taxing theory is inapplicable to aircraft because of the nature of their operation and use. Here follow a number of such statements from the opinion:

297. "The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier 'engaged in running railroad cars into, through, and out of the state, and having at all times a large number of cars within the state * * * by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the state bears to the whole number of miles in all the states over which its cars are run.' *Union Refrigerator Transit Co. v. Kentucky*, supra, 26 S. C. at page 38. This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instances, the coaches of the company * * * are daily passing from one end of the state to the other * * *." (Citing the *Pullman* case.)

302. "We are at a stage in development of air commerce roughly comparable to that of steamship navigation in 1824 when *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, came before this Court. Any authorization of local burdens on our national air commerce will lead to their multiplication in this country. Moreover, such an example is not likely to be neglected by other revenue-needy nations as international air transport expands."

303. "Students of our legal evolution know how this Court interpreted the Commerce Clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. (Cites *Gibbons v. Ogden*, to *U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377, 61 S. Ct. 291, 85 L. Ed 243). Air as an element in which to navigate is even more inevitably federalized by the Commerce Clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

In the *Northwest* case no specific reference was made to Section 403 of the Civil Aeronautics Code, which declares the navigable air space of the United States for the use of flight by any citizen.

The following parts of the *Northwest* opinion and concurring opinions are in point:

"* * * It (Congress) may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether."

304. "Certainly today flight over a state either casually or on regular routes and schedules confers no jurisdiction to tax. * * * Undoubtedly a plane,

like any other article of personal property, could land or remain within a state in such a way as to become a part of the property within the state. But when a plane lands to receive and discharge passengers, to undergo servicing or repairs, or to await a convenient departing schedule, it does not in my opinion lose its character as a plane in transit. Long ago this Court held that the landing of a ship within the ports of a state for similar purposes did not confer jurisdiction to tax. * * * I cannot consider that to alight out of the skies onto a landing field and take off again into the air confers any greater taxing jurisdiction on a state than for a ship for the same purposes to come alongside a wharf on the water and get under way again."

305. " * * * It might be difficult, in view of the complete control of this type of activity by the Federal Government, to find what benefits or protection any state extends. * * * "

306. "The apportionment theory is a mongrel one, a cross between a desire not to interfere with state taxation and desire at the same time not utterly to crush out interstate commerce. * * * Nothing either in theory or in practice commends it for transfer to air commerce. A state has a different relation to rolling stock of railroads than it has to airplanes. Rolling stock is useless without surface rights and continuous structures on every inch of land over which it operates. Surface rights the railroad has acquired from the state or under its law. There is a physical basis within the state for the taxation of rolling stock which is lacking in the case of airplanes."

314 footnote. " * * * For vessels ordinarily move on the high seas, outside the jurisdiction of any state, and merely touch briefly at ports within a state. Hence they acquire no tax situs in any of the states at which they touch port, and are taxable by the domicile or not at all. * * * "

In the last quotation from the *Northwest* case reference is made to vessels on the high seas and their taxable status. Because of the similarity between the applicable legal principles to the vessels coming in from the high seas and the aircraft coming in from the skies above, appellant has made its Fifth Law Point to prove the legal parallelism between seagoing vessels and aircraft.

**Argument to Sustain Law Point V and Establish
Specification of Errors 7, 9, and 10**

Under Law Points II and III the cases have been reviewed in reference to the *use tax* for highways and the *proportional tax* on rolling stock and inland watercraft. The distinction was definitely made in each instance that either there was a privilege or use tax for the facilities offered, such as the highways, or a sufficient taxable situs attained within the State by the transaction of business therein with the railroad cars, tugs, barges, or boats as company property remaining within the State.

However, vessels coming in from the high seas to a port or in coastwise trade among the states have ever been held free from an ad valorem tax on these vessels by the states they visit in interstate commerce. In every instance wharfage charges were permitted if the wharves were used. Taxes or charges for stevedoring, tugboats that piloted the ship into the port, and taxes for similar facilities were held outside the pale of the constitutional protection of interstate or international commerce. Taxes have been held valid even if the vessels failed to use the facilities provided. No case exists where a vessel from the high seas and engaged in interstate commerce among

the states was held taxable by a state when it came into the port and carried on its interstate business. Nor has any state been permitted to collect a tax merely because there was no showing that the home port or domicile of the vessel did or did not tax.

Whether or not such vessel or such aircraft, as in the case at bar, shall escape taxation is for Congress to govern. The failure of a domiciliary or home port state to tax the instrumentalities forms no basis for an ad valorem tax by another state visited in interstate commerce.

Congress alone may tax for the use of such facilities as it furnishes for navigation on the seas or in the air, if it elects to do so. The air space of the United States has been dedicated to the public for aerial navigation. The high seas have ever been in the public domain and free for navigation. The air space above the United States now has the same legal status.

In *Gibbons v. Ogden* the restriction on state taxation, control or regulation of seagoing craft is made clear. The law then stands as the law of today. The aircraft in question are taxed for the privilege of alighting at the airport. Appellant pays taxes for that privilege. Appellant pays taxes on gasoline in large amounts levied by the State of Nebraska. The gasoline tax is used by the State for the purpose of aiding in the maintenance and upkeep of the airports in Nebraska. The landing charges at the airport are based on the number of landings and takeoffs at the airport made by the aircraft in question.

In *Gibbons v. Ogden* it was said:

“* * * As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principles that the whole commercial world submit to pay light money to the Danes. * * *”

In the *Hays* case (1854), cited and repeatedly quoted from and recently cited in many opinions of the Supreme Court of the United States, it is held:

“An ocean steamer, owned and registered in New York, and regularly plying between Panama and San Francisco, and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo and in Benicia, only for repairs and supplies, is not subject to taxation by the State of California.”

The opinion states:

“The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.”

In *Morgan v. Parham* (1872) cited, the question arose as to the effect of registration and the home port theory of taxation. But the real question in the case was whether or not the vessel which was registered in New York as its domicile and home port could be taxed in Mobile, Alabama, where it came and went in coastwise trade among the states. The opinion emphasizes that the only question involved was the taxable status of the vessel itself. The Court said:

“There was nothing, therefore, in her enrolment in the port of Mobile that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama, under the circumstances stated.

“It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value. * * *”

It will be noted that Congress did not pre-empt the field of navigation as completely as it has the field of aviation. The case cited indicates that the vessel might be taxed at its home port of New York. Under *Standard Oil Co. v. Peck* the vessel could be taxed at the home port providing the vessel of commerce had attained an actual taxable situs there, not otherwise.

In the case at bar the question arises whether or not the lack of taxation by the domiciliary state creates a dilemma in connection with aerial navigation of which the State of Nebraska may take advantage. The opinion below is based in part upon that presumption.

The Court below erred. In this great and fast-expanding and developing new field for flight there is the certainty that aircraft should escape an ad valorem state tax in those states visited only in interstate commerce. It does not follow that the aircraft may escape national

taxation for the national facilities furnished which the air carriers adopt or use. But it does follow that the aircraft must come to port throughout the taxable year at some time and at some designated place other than for interstate commerce. The Stipulation of Facts in the case at bar states that such place for appellant is the Wold-Chamberlain Air Field at St. Paul, Minnesota. No doubt there are other ports to which the planes must come and be stored, overhauled, inspected, repaired, and relicensed.

Congress has pre-empted the field of aviation and has financed many of its facilities. If Congress elects to tax for the facilities it provides and keeps available in the future over the integrated system of national airways, control towers, radio, and lights, aviation may be required "to pay light money to the Danes."

CONCLUSION

Under the facts stipulated in this case and the law and the authorities cited under five Law Points, the errors of the court below are made clear and justify reversal.

In reversing the case and nullifying the Nebraska ad valorem taxing statute directed against appellant's aircraft while engaged in interstate commerce in Nebraska, the Court may properly do so on the grounds that the statute in question is repugnant to Article I, Section 8, Clause 3, of the Federal Constitution.

Dated at Omaha, Nebraska, February 15, 1954.

Respectfully submitted,

WILLIAM J. HOTZ,

WILLIAM J. HOTZ, JR.,

Of HOTZ & HOTZ,

1530-5 City National Bank Building,

Omaha, Nebraska,

Counsel for Appellant.

ROGER J. WHITEFORD,

Of WHITEFORD, HART,

CARMODY & WILSON,

Washington, D. C.,

and

ROBERT M. KANE,

of HOTZ & HOTZ,

Omaha, Nebraska,

Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC., now Braniff Airways,
Incorporated,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
ET AL.

No. 33,260

Filed July 17, 1953

1. Taxation: Constitution and Law. Statutes providing for the levy of an *ad valorem* personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

Original action. Action dismissed.

William J. Hotz, William Hotz, Jr., William F. Dalton and Robert M. Kane, for plaintiff.

Clarence S. Beck, Attorney General, and C. C. Sheldon, for defendants.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

CARTER, J.:

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an

ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire under the provisions of Title 49, U. S. C. A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly scheduled stops on interstate flights. There are 14 of such

flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of $2\frac{1}{2}$ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled

by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc., v. Minnesota*, 322 U. S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A. L. R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate carriers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal

place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is more material to the case before us, if the tax on its personal property regularly used over fixed routes in interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division

of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereof in compelling the carrier to pay the taxing state more than its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it within any announced rule that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of their value, if it is fairly related to their use within the taxing state. The over-all result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operated to exempt them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do

so unless, possibly, evidence of a tax situs in other states would have called for a different result; in any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been different if it had been shown that there was a taxable situs in other states or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were operated on no fixed schedules but the turn-arounds were made as quickly as possible. They remained long enough to unload and take on cargo and to make necessary and temporary repairs. The State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enter-

prises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A. L. R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The *Peck* case distinguishes *Northwest Airlines, Inc., v. Minnesota*, *supra*, on the basis that it was not shown in the latter case that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere." The further statement in the *Peck* case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile," appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned and the system of taxing it at the place at which it is used and by whose laws it is protected when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this

case is relied upon in the Ott and Peck cases is clear. For reasons stated in the Pullman's Palace Car Company case, we think the inland water transportation cases are particularly applicable. The court in the Pullman case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc., v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and transportation systems. Others are based on facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc., v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, Section 9, clause 6, and Article I, Section 10, clause 3, of the Constitution of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff. We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, Section 8, Clause 3, Article I, Section 9, Clause 6, or Article I, Section 10, Clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

APPENDIX "B"

PERTINENT SECTIONS OF THE STATE STATUTES INVOLVED

CHAPTER 77

REVENUE AND TAXATION

RSN 1943, Reissue of 1950

77-1244. *Personal Property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaging solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue

passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, §1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, §2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property; taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

APPENDIX "C"

STIPULATION OF FACTS—Filed February 26, 1953
IN THE SUPREME COURT OF NEBRASKA
General Number 33260

MID-CONTINENT AIRLINES, INC., a Corporation, *Plaintiff*,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT,
et al., *Defendants*

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the municipality of Omaha, and one by the municipality of Lincoln. At these airfields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and

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promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the airport at Lincoln, Nebraska, on two south-bound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1952, operate 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

MID-CONTINENT AIRLINES, INCORPORATED

FLIGHT DATA

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska:

These flights are separated into southbound and northbound flights.

SOUTHBOUND

Flight Number

- | | |
|-----|--|
| 23 | Originates in Omaha, Nebraska, 7:00 am, arriving in Lincoln, Nebraska, 7:27 am, flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 pm the evening before and arrives in Omaha, Nebraska, 9:55 pm, after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa. |
| 395 | Originates in Minneapolis/St. Paul, Minnesota, 7:25 am, making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47 |

Flight Number

- | | |
|----|---|
| | am. This flight leaves Omaha 10:07 am, flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma, and Houston, Texas. |
| 39 | Originates in Minneapolis/St. Paul, Minnesota, 11:30 am, with scheduled stops in |

Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 pm. This flight leaves Omaha 2:40 pm, flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.

97 Originates in Minneapolis/St. Paul, Minnesota, 2:30 pm, flying non-stop to Omaha, Nebraska, arriving 4:14 pm. This flight leaves Omaha 4:29 pm, flying non-stop to Kansas City, Missouri and to Houston, Texas.

9 Originates in Minneapolis/St. Paul, 4:15 pm, with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 pm. This flight departs from Omaha 8:52 pm and arrives in Lincoln, Nebraska, 9:19 pm, leaving Lincoln, 9:24 pm, flying non-stop to Kansas City, Missouri.

319 Originates in Minneapolis/St. Paul, 8:50 pm, flying non-stop to Omaha, Nebraska, arriving 10:09 pm. This flight leaves Omaha 10:09 pm, flying non-stop to Kansas City, Missouri.

NORTHBOUND

16 Originates in Kansas City, Missouri, 7:40 am, flying non-stop to Omaha, Nebraska, arriving 8:45 am. This flight leaves Omaha 9:00 am, flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.

18 Originates in Kansas City, Missouri, 9:15 am, flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 am. This flight leaves Omaha 10:35 am, flying non-stop to Minneapolis/St. Paul, Minnesota.

- 4 Originates in Kansas City, Missouri, 12:15 pm, stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 pm. This flight leaves Lincoln 1:41 pm, arriving in Omaha 2:08 pm. This flight leaves Omaha 2:23 pm, flying non-stop to Sioux City, Iowa.
- 302 Originates in Kansas City, Missouri, 2:45 pm, flying non-stop to Omaha, arriving 3:35 pm. This flight leaves Omaha, 3:50 pm and flies non-stop to Minneapolis/St. Paul, Minnesota.
- 38 Originates in St. Louis, Missouri, 3:30 pm after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 pm. This flight leaves Lincoln 6:46 pm, and arrives in Omaha, 7:13 pm. This flight leaves Omaha 7:28 pm, flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.
- 300 Originates in Kansas City, Missouri, 5:30 pm, and flies non-stop to Omaha, Nebraska, arriving 6:20 pm. This flight leaves Omaha, Nebraska 6:40 pm, flying non-stop to Minneapolis/St. Paul, Minnesota.
- 322 Originates in Kansas City, Missouri, 9:45 pm, flying non-stop to Omaha, Nebraska, arriving 10:35 pm. This flight leaves Omaha, 10:55 pm, flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared
with Total System Aircraft Time
Nebraska Time

	Flight No.	Air	Ground	Total
1. Southbound	23	1:09	:05	1:14
2.	395		:20	:20
3.	39		:15	:15
4.	97		:15	:15
5.	9	1:09	:20	1:29
6.	319		:20	:20
7.	7		9:05	9:05
8. Northbound	16		:15	:15
9.	18		:15	:15
10.	4	1:09	:20	1:29
11.	302		:20	:20
12.	38	1:09	:20	1:29
13.	300		:20	:20
14.	322		:20	:20

Total	4:36	12:50	17:26
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System Total (27 x 24:00)	648:00
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Ratio—Nebraska to System	2.70%
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Eight aircraft operate the above
schedules in normal rotation.

6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originat- ing and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
--	--	--------------------------------

39,215	84,605,029	.046%
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7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originat- ing and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebras- ka Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights, being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p. m., arriving in Omaha at 9:55 p. m., leaving Omaha at 7:00 a. m., arriving in Lincoln at 7:27 a. m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property
between Lincoln and Omaha, Nebraska
July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska	11,906	5,319	4,864	713
System total	2,084,447	1,362,379	1,946,824	263,075
Ratio	.571%	.390%	.250%	.271%

9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing

to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance, tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 U.S.C.A. Ch. 9, §§ 401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically de-

scribed and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight equipment, including radio and all communication devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers spaced throughout the parts of the United States

directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts (49 U. S. C. A. §§ 560, 610 (a), 623; 61.306, 60.18(c) of Civil Air Regulations).

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Okla-

homa, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mail and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was \$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied to its aircraft at Omaha. In 1951, 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any

such property is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and 11½% of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows:

Airline Assessments 1950

MID CONTINENT AIRLINES

1. System Value Formula

A. Five Year Average Net Operating Income

Capitalized at 6%	\$5,484,350
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B. Five Year Ave. Mkt. Value of Stocks and Bonds

	3,927,634
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C.	Book Value Depreciated Cost Basis	707,864	
	Average of A, B and C or System Value		3,373,283
2.	Flight Equipment Apportionment Formula		
A.	Ratio of Flight Equipment Cost (Sec. B) to Total Operating Property Cost (Sec. F)	1,771,360	61.1%
		<hr/> 2,899,660	
B.	Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F)	237,322	33.5%
		<hr/> 707,864	
	Average of A and B or Apportionment Factor		47.3%
3.	Allocation Formula		
A.	Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures	10,306	9.032
		<hr/> 114,104	
B.	Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled	8,008	11.541
		<hr/> 69,389	
C.	Ratio of Revenue Originating within Nebraska to Total Revenue	537,894	9.235
		<hr/> 5,824,803	
	Average of A, B and C or Allocation Factor		9.936

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4. Allocated Value (Result of System Value x Apportionment Factor x Allocation Factor $3,373,283 \times 47.3 = 1,595,563 \times 9.936 = \$158,535$)

5. Equalized value

$\$158,535 \times 75\% = \$118,901$

23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that resulted in the mill levy of 36 and 38, respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29, which remains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations

for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants of intrastate to interstate business carried on by the plaintiff in Nebraska.

27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

Mid-Continent Airlines, Inc.,
a Corporation, *Plaintiff*,
By /s/ Wm. J. Hotz
Of Hotz & Hotz,
1530-5 City National Bank Building,
Omaha 2, Nebraska,
Its Attorneys.

Dated at Lincoln, Nebraska, February 26, 1953.

Nebraska State Board of Equalization
and Assessment, et al., *Defendants*,
By CLARENCE S. BECK,
Attorney General,
By /s/ C. C. SHELDON,
Assistant Attorney General.

